

**MINUTES OF THE  
ADMINISTRATIVE RULES REVIEW COMMITTEE**  
Tuesday, October 30, 2001 – 9:00 a.m. – Room 305 State Capitol

**Members Present:**

Sen. Howard A. Stephenson, Senate Chair  
Rep. David Ure, House Chair  
Sen. Ed Mayne  
Rep. Judy A. Buffmire  
Speaker Martin R. Stephens

**Members Absent:**

Sen. Mike Dmitrich  
President Al Mansell  
Sen. Michael G. Waddoups  
Rep. James R. Gowans  
Rep. John E. Swallow

**Staff Present:**

Mr. Arthur L. Hunsaker, Research Analyst  
Ms. Cassandra Bauman, Legislative Secretary

**Note:** A list of others present and a copy of materials can be found at <http://www.image.le.state.ut.us.imaging/history.asp> or contact the Office of Legislative Research and General Counsel.

**1. Call to Order and Approval of Minutes**

Chair Stephenson called the meeting to order at 9:16 a.m.

Due to the lack of a quorum, no vote was taken on the minutes.

**2. Mental Health Courts**

Rep. Matt Throckmorton stated that the establishment of a mental health court in Utah has broad public policy implications that should be addressed in a public hearing.

Mr. Rick Schwermer, Assistant Court Administrator, explained that a court, in Utah, is not a separate court, like a judicial court or a juvenile court, but a calendar, which schedules a number of similar cases at the same time. Most of those participating in the court come from the Salt Lake County jail. He stated that the mental health court is an effort to address the needs of individuals with mental health problems who are sent to jail numerous times.

Mr. Schwermer stated that the courts have neither sought nor felt it necessary to seek legislative authority to provide mental health courts, drug courts, or gun courts because the courts are distinguished only by their rearrangement of the schedule for particular kinds of hearings.

Sen. Howard Stephenson inquired whether legislation regarding courts exists. Mr. Schwermer stated that there are statutes regarding the funding of the courts, but not the authority to create a court.

Speaker Martin Stephens questioned whether the judges who deal with these particular courts dedicated their schedule solely to that particular schedule or if they have other calendars. Mr. Schwermer clarified that the judge sets aside time from his regular calendar to hear specific cases, related to mental health in this case, where specialists may be in attendance at the same time for all the cases which deal with mental health.

Rep. Throckmorton explained that Article VIII, Section 5 of the Utah Constitution states that "a district court shall have appellate jurisdiction as provided by statute and the jurisdiction of all other courts by original and the appellate shall be provided by statute." He indicated that defining a mental health court as a "court" is a necessity in order for the courts to obtain the authorization to create individual "courts," such as a mental health court. Rep. Throckmorton also expressed concern that individuals who are put through the mental health court and adjudicated mentally ill will have that adjudication on their record for life.

Speaker Stephens questioned which rights are given up to take an individual's case into a mental health court. Mr. Schwermer stated that the rights given up would be no different than the rights given up to someone who pleads guilty in any case. He emphasized that the individual who opts to take the case to the mental health court must plead guilty to the charge. He indicated that the Judicial Council placed that circumstance on all special courts within the judicial system.

Rep. Judy Buffmire indicated that help has not been available in the past for individuals with mental health issues and now that it is, the chance for treatment is greater with a mental health court than in the jail system.

Rep. Throckmorton stated that many concerns are raised with this issue and that it may be necessary to address this issue in the 2002 General Session. He asked the Committee to request staff to provide a legal opinion about whether a mental health court is a court as defined by the Utah Constitution, and if it is, whether it should be established by statute. Sen. Stephenson said the committee chairs would make that request.

### **3. Emergency/Proposed Rules of the Alcoholic Beverage Control Commission**

Rep. Ure requested that the Department of Alcoholic Beverage Control explain the purpose behind the recent emergency rule and how it was written.

Mr. Earl Dorius, Licensing and Compliance Officer, Department of Alcoholic Beverage Control, provided background on the issue, stating that to further the policy of the Alcoholic Control Act - to make alcohol reasonably available to those who want it, without promoting it or encouraging its sale and consumption - the Legislature enacted a series of statutes limiting the advertising of alcohol. He said court cases challenging state bans on regulations on truthful commercial speech forced states to show substantial government interest for regulating the advertisement of alcohol and that the regulations each state chose to enact directly and materially advanced the substantial government interest.

Mr. Dorius stated that clear guidelines for beer advertising were established in 1996. Statutes established a ban on advertising liquor, wine, and full strength beer. He explained that statutes which ban the advertising and display of liquor were found unconstitutional, and that Utah's distinction between beer advertising and alcohol advertising was found irrational. He explained that UCA sections 32A-12-401(2) and (4) have been found unconstitutional in the tenth circuit court, requiring the Alcoholic Beverage Control Commission had to engage in rulemaking. He indicated that the Commission had to identify statutes that cannot be enforced because of the court ruling.

Mr. Dorius explained that public hearings on the emergency rule, R81-1-17, have been numerous in order to acquire information for writing the permanent rule. He indicated that the emergency rule expires December 7, 2001. He noted that the permanent rule will be published in the November 1, 2001 bulletin in order to establish an enactment date of December 4, 2001.

Rep. Ure questioned the authority of R81-1-17(b), which states that all statutory language shall remain in effect and under full enforcement of the law unless otherwise provided by the rule.

Mr. Thom Roberts, Attorney General's Office, cited UCA section 32A-12-401(2)(f), which reads in part, "except as otherwise authorized by this title or the rules of the commission", referring to the Alcoholic Beverage Control Commission. He indicated that this authority was given to the Commission to allow the promoting of alcohol during specific events.

Chair Stephenson stated that the authority given in R81-1-17(b) is not the same as UCA section 32A-12-401(2)(f).

Ms. Patricia Owen, Associate General Counsel, Office of Legislative Research and General Counsel, discussed the scope of the recent Court of Appeals decision related to Utah's advertising rules. She indicated that rulemaking authority is delegated to the executive branch by the Legislature and discussed potential issues raised by the delegation.

Mr. Dorius explained that the decision which enjoined the two statutes had a broad sweep over the code. He indicated that the concepts in those statutes spill over in other statutes. He indicated that the law suit in the tenth circuit court challenged every advertising statute within the Alcohol Control Act. He stated that searching through the statutes to address the tenth circuit opinion was very difficult.

Mr. Nick Hales, Chair, Alcoholic Beverage Control Commission, stated that the landscape of commercial free speech has been expanded over the past few years and that it is a very fluid concept. He stated that he would address the concern in the board meeting tomorrow and consider proposed language to address the concerns of the Committee. He indicated that the Governor's Office and leadership of House and Senate have discussed this issue and decided that the Commission should handle this issue quickly instead of calling a special session or waiting for the general session.

Rep. Ure indicated that the wording of the rule could be smoother. He noted that the rule does not reflect the Commission's interpretation of the rule.

Sen. Stephenson expressed dissatisfaction with the rule language suggesting that the rule can supercede statute. He requested that the language be specifically addressed in the Commission's review of the rule.

#### **4. Report: Snagging Salmon**

Sen. Ed Mayne provided background on the issue as presented in the August 28, 2001 meeting.

Mr. Tom Pettingill, Sportsman Coordinator, Division of Natural Resources, stated that the Board met on October 11, 2001 and unanimously recommended that the current rule language be maintained. He

explained that Mr. John Kimball, Director, Division of Natural Resources, had asked board members to comment on the issue and that all members felt a strong dissatisfaction with snag fishing in general. He stated that the minutes from that meeting, once approved at the November 17 meeting, would be distributed to Committee members.

Sen. Mayne said the rule on snagging fish should exempt catch and release sportsmen. He indicated that he is prepared to request legislation to resolve the issue, but stated that the rule could be amended to accomplish the same purpose.

## **5. Advisory Documents of State Agencies**

Mr. Bishop discussed the process of reviewing agency advisory documents. He quoted Mr. Kenneth Culp Davis in his "Administrative Law Treatise," (Volume 1, Section 3.5, paragraph 20): "[the Legislature] has not delegated to any agency, the power to make policy decisions that bind courts and citizens through formats like letters, manuals, guidelines, briefs, or by implication, memos, bulletins, newsletters, etc. Statements in such informal formats may not even represent an agency's choice of policies."

Mr. Bishop suggested that: (1) state agencies are using a wide range of methods to for determining whether an issue should be addressed in rule or in an advisory document, (2) in some instances agencies are not clear in their reasons for using specific publications as they handle these issues, and (3) in some instances agencies are implying that advisory documents may be enforceable by a court of law.

Mr. Bishop recommended that the Committee publish a document which would encourage agencies not to use advisory documents until rulemaking issues have been thoroughly examined. He suggested that the Executive Branch advise agencies to look to rulemaking first. He stated that the Administrative Rulemaking Act specifies interpreting, not informing, as a reason for rulemaking. He suggested that this is the difference between rules and advisory documents.

Sen. Stephenson indicated that the reason rules are being written better in recent years may be related to the proliferation of advisory documents.

Mr. Bruce Johnson, Tax Commission (Utah State Tax Commission), stated that there is a distinction between advisory documents and rules which may not be understood by the general public. He stated that advisory documents makes it simpler for the administrators, but not for the public. He also indicated that maintaining advisory documents is necessary. He stated that a difference between interpreting and informing is difficult to assess; to inform, interpretation may be needed. He stated that it is a valuable exercise to continually review this issue.

Mr. Bishop suggested that the Executive Branch require agencies to publish a disclaimer to the effect that advisory documents are advisory only and are not enforceable in a court of law.

Ms. Pam Hendrickson, Chair, Tax Commission, stated that she would resist any disclaimer stating that bulletins are not enforceable. She indicated that fees are established when compliance is not present regarding Tax Commission bulletins.

Mr. Hansen suggested that the executive branch be given time to work on the issue and address the questions: (1) What should be provided in rule? (2) What is an advisory document? and (3) What should be included in both rule and an advisory document?

Chair Stephenson requested that staff maintain involvement throughout the process and keep the Committee informed.

## **6. Committee Business**

### **A. Dates of Future Meetings**

The Committee discussed future meetings tentatively for Tuesday, November 20, 2001 or Tuesday, November 27, 2001 and Tuesday, December 4, 2001 or Tuesday, December 11, 2001 at 9:00 a.m. Staff was directed to poll absent Committee members regarding future meeting dates.

### **B. Items for Next Meeting**

Rep. Buffmire asked the Committee and staff to review emergency rule R501-12 in the October 15, 2001 bulletin. Sen. Stephenson stated that problems are still being brought to the Committee's attention regarding the practice and interpretation of the rule.

## **7. Adjourn**

Due to a lack of a quorum, Chair Stephenson adjourned the meeting at 11:24 a.m.

